

No. 10,078.

IN THE

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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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HELEN M. SUTHERLAND, CHARLES W. SUTHERLAND,  
M. I. HIGGENS, MAYBELLE HIGGENS and HELEN  
MAUDE LORENZ,

*Appellants,*

*vs.*

FRANK A. GARBUTT, CHANDIS SECURITIES COMPANY,  
a corporation, ALICE CLARK RYAN, LOG CABIN MINES  
COMPANY, a corporation, and MUTUAL GOLD CORPO-  
RATION, a corporation,

*Appellees.*

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BRIEF OF APPELLEE, CHANDIS SECURITIES  
COMPANY.

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Introductory Statement.

The appellee, Chandis Securities Company, was joined as a defendant in the action brought by appellants in the United States District Court, Southern District of California, Central Division, from whose decision this appeal is taken, by reason of the fact that it is a co-owner of

the mining claims situated in Mono county, California, the subject of the purchase and sale contract involved in the action [Tr. p. 23] and a party to the contract, and for the purpose of making the judgment of the court binding upon it, the only relief against the owners sought being that they "be required to recognize Mutual Gold Corporation as vendee, owning the purchase contract and to accept from these plaintiffs as stockholders of Mutual Gold Corporation on its behalf, the unpaid balance of said installment (the \$10,000.00 installment of purchase price which fell due November 1, 1939)." [Complaint, Tr. p. 21.]

Although the complaint contains allegations to the effect that the various contracts, deeds, bills of sale and assignments of which appellants complain, were executed, and the various acts of Frank A. Garbutt, Mutual Gold Corporation and Log Cabin Mines Company of which appellants complain, were done with the knowledge and approval of the owners pursuant to and as a part of an unlawful conspiracy to transfer all of the assets of Mutual Gold Corporation to Log Cabin Mines Company without consideration, etc. [Tr. pp. 13, 14 and 15], the conspiracy alleged is one to which Frank A. Garbutt and the board of directors of Mutual Gold Corporation and not the owners are alleged to be parties [Tr. p. 7], and there was produced no evidence to prove these allegations or to indicate even that the appellee, Chandis Securities Company, had actual knowledge of any of the acts complained of at the respective times when they were done.

The dispute out of which this litigation arose is between parties to the action other than the appellee, Chandis Securities Company, and all of the questions involved in the appeal suggested by appellants in their opening brief concern issues affecting that dispute. Inasmuch as those questions presumably will be covered in the brief to be presented by counsel for appellees, Frank A. Garbutt, Mutual Gold Corporation and Log Cabin Mines Company, parties directly concerned in the dispute, it is felt that no useful purpose can be served by attempting to cover those questions in this brief. However, the appeal does involve a question concerning the owners not mentioned in appellant's opening brief which should be considered in the determination upon the appeal. The brief of appellee, Chandis Securities Company, will be devoted to this question.

### **Question Concerning Owners Involved in Appeal.**

In a derivative stockholder's suit seeking on behalf of the corporation a decree for equitable relief, including the setting aside of assignments of the purchaser's interest under a purchase and sale agreement, and requiring the sellers to recognize the corporation as the owner of the purchaser's interest and to accept payments upon the purchase price from the plaintiffs on behalf of the corporation, may the plaintiffs be required to do equity by paying or tendering or requiring the corporation to pay or tender payment of sums due the sellers under the purchase contract?

### Statement of the Case.

Determination of the above question requires consideration of certain facts in addition to those set out in the statement of the case contained in appellant's opening brief. The contract for sale and purchase of the Log Cabin mining claims situated in Mono county, California [Tr. p. 23], as amended under modification agreement dated October 10, 1936 [Tr. p. 45] provided for payment to the sellers of a purchase price of \$150,000.00. Under the modification agreement, minimum annual installments of \$10,000.00 each fell due on November 1, 1937, November 1, 1938, November 1, 1939 and November 1, 1940, and the balance (\$100,000.00) fell due November 1, 1941. At the time the action was brought, Mutual Gold Corporation had paid \$20,000.00 on the purchase price (App. Op. Br. p. 7), Frank A. Garbutt paid the \$10,000.00 installment which fell due November 1, 1938. [Tr. p. 38.] The \$10,000.00 installments which fell due November 1, 1939 and November 1, 1940, respectively, were paid during the pendency of the action.

Appellants offer to pay to the owners the \$10,000.00 minimum installment of purchase price which fell due November 1, 1939 [Tr. p. 16], but while making a general offer to do equity [Tr. p. 20] do not offer on behalf of themselves or Mutual Gold Corporation to pay the remainder of the purchase price.



### Argument.

The judgment of the District Court denying appellants the relief sought should be affirmed, because appellants have not tendered or required Mutual Gold Corporation, for whose benefit the relief is sought, to tender payment to the owners of the entire purchase price in accordance with the terms of the purchase contract as amended. The action being a derivative stockholder's suit and one in which equitable relief against the owners is sought, the equities of Mutual Gold Corporation, as well as those of the individual appellants, must be taken into account. Appellants cannot seek equity for the benefit of the corporation without doing equity or requiring that the corporation do equity in reference to the rights of the owners against whom equitable relief is sought.

The following authorities are cited:

*Garretson v. Pacific Crude Oil Co. et al.*, 146 Cal. 184;

*Michaels v. Pacific Soft Water Laundry*, 104 Cal. App. 349, 286 Pac. 165.

In the case of *Garretson v. Pacific Crude Oil Co., et al.*, *supra*, the California Supreme Court affirmed judgment of the Superior Court for defendants in a derivative stockholder's suit brought to cancel certain shares of the corporation issued in exchange for leases assigned to the corporation, and held:

“We do not think the plaintiff has made a case which would warrant the court in canceling the shares given in payment for the leases, and at the same time allow the corporation to retain the consideration, and

plaintiff does not offer to restore the leases. Plaintiff is seeking equity for the benefit of the corporation while wholly failing to do equity or requiring the corporation to do equity.”

The case of *Michaels v. Pacific Soft Water Laundry, et al., supra*, involves a stockholder's derivative suit brought in the California Superior Court to cancel certificates for 22,100 shares of the stock of the defendant corporation sold by the corporation from its treasury for cash at par, on the ground that the stock was issued in violation of the terms of a permit issued by the California Corporation Commissioner. The trial court rendered judgment canceling the stock without requiring that the corporation restore to the purchaser the purchase price paid. In reversing the decision the California District Court of Appeal points out that the equities between the corporation and the purchaser of the stock must be considered, and that where treasury stock is sold to a bona fide purchaser in violation of conditions contained in the permit of the Corporation Commissioner, the stock cannot be canceled without requiring the corporation to restore to the purchaser the consideration paid.

It is respectfully submitted that appellants are not entitled to a decree requiring the owners to recognize Mutual Gold Corporation as the owner of the purchaser's interest in the purchase contract without requiring that the corporation on whose behalf suit is brought pay to the owners the remaining purchase price under the contract in accordance with its terms.

Respectfully submitted,

RICHARD G. ADAMS,

*Attorney for Appellee, Chandis Securities Company.*